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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERICK RENTERIA, Defendant and Appellant.	B283589 (Los Angeles County Super. Ct. No. LA078571)

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan M. Speer, Judge. Affirmed and remanded with directions.

Andrea Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Erick Renteria appeals the judgment entered following a jury trial in which he was convicted of first degree murder (Pen. Code,[1] § 187, subd. (a); count 1) and possession of a firearm by a felon (§ 28800, subd. (a)(1); count 2). The jury further found that appellant had personally and intentionally discharged a firearm causing death. (§ 12022.53, subd. (d).) The trial court sentenced appellant to an indeterminate term of 25 years to life for the murder conviction and imposed the same term to run consecutively for the firearm enhancement. The court also imposed a concurrent term of three years for the conviction on count 2. This appeal followed. Subsequently, Renteria filed a petition for writ of habeas corpus in case No. B289963.[2]

Appellant contends: (1) The trial court erred in denying his request to discharge retained counsel and appoint new counsel in violation of appellant's Sixth and Fourteenth Amendment rights; (2) The trial court's refusal to allow appellant to change his plea to not guilty by reason of insanity violated appellant's rights under state law and his federal constitutional rights; (3) The trial court infringed appellant's state and federal constitutional rights to due process and a fair trial by failing to cure prosecutorial misconduct during closing argument and by denying appellant's motion for a new trial based on the prosecutor's misconduct; and

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[1] Undesignated statutory references are to the Penal Code.

[2] We have concurrently considered appellant's petition for writ of habeas corpus, which raises multiple claims of ineffective assistance of counsel. Those claims will require an evidentiary hearing for resolution, and we therefore separately issue an order to show cause returnable in the superior court.

(4) The trial court erred in failing sua sponte to instruct on involuntary manslaughter based on unconsciousness due to voluntary intoxication. We disagree and affirm the judgment of conviction. Appellant further contends, the Attorney General concurs, and we agree that the case should be remanded to allow the trial court to consider whether to strike the firearm enhancement under the discretion conferred by Senate Bill No. 620. (2017–2018 Reg. Sess.) On remand, appellant is entitled to place on the record information relevant to his eventual youth offender parole hearing in accordance with *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

FACTUAL BACKGROUND

Around 4:30 a.m. on July 22, 2014, Jesus Vasquez, his supervisor Francisco Miguel, and a few other employees of Fleet Wash Services were power washing the floors of the parking structure of a Target department store located at the corner of Sepulveda Boulevard and Hatteras Street. Vasquez was working on the fourth floor of the structure while Miguel was working near the company water recovery truck which was parked on the street. Vasquez looked over the edge of the structure toward the ground floor and saw Miguel stumble and fall to the ground. Vasquez walked downstairs to see what had happened and found Miguel on the ground at the driver's side of the truck. Miguel had been shot in the face and was bleeding profusely. He said repeatedly, " 'Me dispararon' "—" 'They shot me,' " and told Vasquez he could not breathe.

As Vasquez was calling 911 appellant walked past him carrying a long knife and stabbed Miguel. Vasquez and appellant began to struggle over the knife, and Miguel managed to climb into the driver's seat of the truck. Appellant broke free

of Vasquez's hold and lunged toward Miguel, stabbing him twice. Miguel moved over to the passenger seat, whereupon appellant walked around to the other side of the truck and stabbed Miguel three more times.

Los Angeles Police Officer Jean-Pierre Charles responded to the 911 call. As he arrived on the scene, he saw appellant inside the cabin of a white truck parked on Hatteras Street west of Sepulveda Boulevard. Appellant was making a stabbing motion toward a person in the driver's seat. Pointing his gun at appellant, Officer Charles ordered him to get out of the car. Appellant looked in the officer's direction and exited the vehicle. But when he was ordered to put his hands up, appellant said, " 'Fuck that,' " and walked away.

During the confrontation with police appellant was defiant and aggressively resisted the officers' attempts to handcuff him. It took five officers to eventually take him into custody. After his arrest appellant was transported to the hospital.

Homicide detective James Nuttal investigated the crime scene after appellant had been detained. Three cartridge casings consistent with a .380-caliber semiautomatic handgun were found near the truck, and Detective Nuttall recovered a .380-caliber semiautomatic handgun along the sidewalk on Sepulveda Boulevard. It was out of ammunition. Based on information that appellant had appeared to throw a weapon, Detective Nuttall retraced appellant's steps and found a knife with a stainless steel blade and a black handle in the hedges along the south sidewalk on Hatteras Street.

Detective Nuttall also testified about the Target store surveillance video from the early morning hours of July 22, 2014, which captured the activity along Sepulveda Boulevard.[3] At the time stamp 4:37:58 a.m., the video showed an individual wearing dark clothing matching appellant's description emerge from between two buildings on the east side of Sepulveda Boulevard and walk north toward Hatteras Street. From 4:38:32 to 4:39:40 a.m., appellant crossed the street, proceeded west on Hatteras Street toward the location of the Fleet Wash Services truck, and disappeared from view. Appellant reappeared, and at 4:40:16 a.m. he paused at the spot where police later recovered the semiautomatic handgun. The video then showed appellant disappearing between the two buildings from which he had first emerged. At 4:56:00 a.m. the video showed appellant again walk out from between the two buildings, walk north on the east side of Sepulveda Boulevard toward Hatteras Street, and make his way westbound on Hatteras. At 4:57:10 a.m. appellant disappeared from view.

Miguel was pronounced dead at the hospital. The parties stipulated his death resulted from four gunshot wounds and ten stab wounds. Three of the wounds were rapidly fatal: the gunshot wound to the left lower back, and two of the stab wounds, one to the left upper chest and the other to the right armpit. The parties also stipulated that the Target store

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[3] The DVD contained several files with different views of the street taken by different security cameras. There was no video of the actual crime scene on Hatteras Street, however.

surveillance video "accurately depict[ed] the occurrences at the location as detailed on the time stamp."

Appellant's mother testified that she physically abused appellant when he was a child, and he had started using drugs when he was 15 years old. Dr. Ronald Markman, a specialist in forensic psychiatry, met with appellant twice in July 2015 to conduct a psychiatric evaluation. Dr. Markman testified that appellant had had a "very tragic upbringing," marked by physical and mental abuse and a long history of untreated drug and alcohol addiction.

Dr. Markman testified that appellant used methamphetamine every day, and he had also used LSD, PCP, and heroin. According to the hospital records from the day of appellant's arrest, appellant was evaluated for possible heart failure, but there was no indication he had actually suffered a heart attack. Dr. Markman observed that methamphetamine use can have a very negative effect on heart function, simulating some of the symptoms of heart failure. He also noted that the drug can produce symptoms that mimic a psychosis, causing a person to hear voices, become paranoid, and act aggressively "in a very rapid, thoughtless manner." He further explained that long-term abuse of methamphetamine can change the biochemistry of the brain so that the "disturbance associated with the drug use" may be present even when the person has not taken any drugs.

Dr. Markman opined that appellant had no functional psychiatric disorder, and any symptoms that could have been associated with a mental disturbance such as schizophrenia resulted entirely from appellant's long-term substance abuse. Dr. Markman also stated that appellant had responded

dishonestly on the written psychological assessment test in an apparent effort to skew the results "to look bad."

In the prosecution's rebuttal, the parties stipulated that Dr. Shaheen Lakhan, a neurologist, had conducted a comprehensive neurological assessment of appellant, which included a review of appellant's history, an interview, and a physical examination. As a result of that assessment, Dr. Lakhan concluded that appellant did "not show or exhibit any signs of an organic neurological process, being a brain and spinal cord, or peripheral nerve pathology." The parties further stipulated that Dr. Lakhan concluded appellant exhibited "evidence of behavioral disturbances but none explained by a neurological disorder."

DISCUSSION

I. The Trial Court's Denial of the Request to Discharge Retained Counsel

A. *Factual background*

A felony complaint was filed in this case on July 24, 2014, and, represented by the public defender, appellant entered a plea of not guilty. On August 4, 2014, Louisa Pensanti substituted in as appellant's retained counsel, and Pensanti represented appellant at the preliminary hearing on April 2, 2015. At pretrial conferences in August, September, and October 2015, the last day for trial was set and then continued to December 2, 2015. At the pretrial conference on November 17, 2015, Jean Wiebe substituted into the case as appellant's retained counsel, and trial was continued to February 1, 2016. Thereafter, the trial date was continued twice more to May 27, 2016.

On May 23, 2016, the trial court granted appellant's request to relieve Attorney Wiebe and allowed Pensanti to

substitute back into the case. Noting the case was already "really old," the court granted Pensanti's request for a continuance to July 20, 2016. On July 20, 2016, over the People's objection, the court granted another defense continuance to August 2, 2016, stating there would be no further continuances. But on August 2, 2016, at the request of the defense and again over the People's objection, the court continued the trial to August 25, 2016. On August 25, 2016, the court trailed the pretrial conference to September 16, 2016, and the minute order indicates the "last day for trial remains October 14, 2016." The pretrial conference was trailed again and held on September 21, 2016. At the pretrial conference the matter was set for jury trial to begin on October 11, 2016.[4]

On September 23, 2016, the court heard appellant's request to replace Pensanti with another attorney from the public defender's office. The court recounted the two-year timeline of the case, including appellant's changes of attorney and Pensanti's multiple appearances on appellant's behalf. The court also noted that appellant made his request to relieve Pensanti the day after a pretrial conference in which the court had set the matter for trial with no further continuances.

Appellant asked for permission to speak and told the court he did not feel Pensanti knew what she was doing and he no longer trusted her. The court asked how he had reached that conclusion, and appellant responded, "I'm listening to my heart," and, "It's my life we're talking about. I want someone to actually

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[4] Thereafter, the case was continued or trailed six times before jury trial finally commenced on November 2, 2016.

try to help me." At that the court stated, "Well, then I suggest the only thing I'm willing to do is conduct a *Marsden*[5] hearing." Addressing Pensanti, the court declared, "If [appellant] can prove to me that you are not adequately representing him or the relationship is so disintegrated that he cannot continue to work with you, that's the only reason I'm going to sub you out. [¶] Unless you have private counsel ready to come in and ready to try this case." Appellant affirmed that he wanted "a state-appointed or public defender."

After hearing from appellant and Pensanti in the closed session, the court found Pensanti had adequately represented appellant and there was no breakdown in the attorney-client relationship that would make continued representation impossible. Declaring appellant's request to be "too little, too late," the trial court denied appellant's request to relieve counsel.

B. *Applicable law*

It is well settled that " '[t]he right to retained counsel of choice is—subject to certain limitations—guaranteed under the Sixth Amendment to the federal Constitution.' " (*People v. Maciel* (2013) 57 Cal.4th 482, 512 (*Maciel*), quoting *United States v. Gonzalez–Lopez* (2006) 548 U.S. 140, 144; *People v. Verdugo* (2010) 50 Cal.4th 263, 310 (*Verdugo*).) Our Supreme Court has recognized that this right "reflects not only a defendant's choice of a particular attorney, but also his decision to discharge an attorney whom he hired but no longer wishes to retain." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*); *Verdugo*, at p. 311.)

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[5] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

A defendant's right to discharge his retained attorney is not absolute, however. (*Maciel*, *supra*, 57 Cal.4th at p. 512; *Ortiz, supra,* 51 Cal.3d at p. 983.) The trial court has broad discretion to deny a request to discharge retained counsel if acceding to it " ' "will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.' " ' " (*Maciel*, at p. 512; *Verdugo, supra,* 50 Cal.4th at p. 311.) "We review a trial court's denial of a request to discharge retained counsel for an abuse of discretion." (*People v. Lopez* (2018) 22 Cal.App.5th 40, 47 (*Lopez*); *Maciel*, *supra*, 57 Cal.4th at p. 512 [trial court "acted within its discretion" in denying request to discharge counsel]; *Verdugo*, *supra*, 50 Cal.4th at p. 311 [trial court acted "well within its discretion" in denying request to relieve retained counsel].) Under this standard of review, a trial court may be found to have abused its discretion only " 'when its ruling "fall[s] 'outside the bounds of reason' " ' " (*People v. Smith* (2018) 4 Cal.5th 1134, 1182), "all circumstances being considered" (*People v. Beames* (2007) 40 Cal.4th 907, 920; see *Maciel*, *supra*, 57 Cal.4th at p. 513 ["trial court reasonably denied defendant's motion because relieving counsel under these circumstances would have resulted in the ' "disruption of the orderly processes of justice" ' "]).

C. *The trial court did not abuse its discretion*

Under the circumstances presented here, we find no abuse of discretion in the trial court's denial of appellant's request to discharge retained counsel. As the court noted in first considering the request, by the time appellant sought to relieve his attorney, the case had been pending for more than two years and the prosecutor had already objected to any further continuances. Indeed, appellant's request to discharge counsel

came shortly after the trial court had declared there would be no further continuances and set a trial date three weeks hence. Trial ultimately began just five weeks later. Appellant had no substitute counsel in mind but requested that the court reappoint the public defender. But as the trial court explained, "there [was] not a public defender . . . in the entire county" who could be appointed and be ready to try the case when it was due to be tried. Appointment of the public defender would result in a significant delay given that any new attorney would require "maybe a year's continuance to get ready on a murder case." In light of the history of retained counsel's involvement in the case, the number of continuances already granted, and the timing of appellant's request, the trial court was justifiably suspicious that appellant was simply stalling.

During the closed *Marsden* hearing that followed, appellant complained that his retained counsel did not "know what she was doing," she did not seem equipped to present an insanity defense, she did not consult with him about the case, she had been disbarred, she was never prepared, and all she did was postpone the case. Counsel joined in appellant's request to relieve her as counsel because the situation had become "untenable" and she could no longer be appellant's attorney in light of his attitude.

The court responded that it found the circumstances of appellant's eleventh hour request to be "very suspicious," observing, "At the moment we are now going to trial and you suddenly can't get along with an attorney you've had since 2014 who has made 15 appearances with you and who is privately retained twice." The court added, "We're talking about a six-to-12-month continuance. The People are entitled to a speedy trial as well. [¶] This case occurred in 2014. It's the oldest case on

my docket. I don't think proceeding with [retained counsel] would prevent you from getting a fair trial." Finally, the court noted the absence of inadequate representation by counsel or an actual breakdown in the relationship that would make proper representation impossible.

Under these circumstances we conclude the trial court reasonably denied appellant's request because relieving counsel would have resulted in the " ' "disruption of the orderly processes of justice." ' " (*Maciel*, *supra*, 57 Cal.4th at p. 513; *Ortiz, supra,* 51 Cal.3d at p. 983.)

D. *The trial court did not apply the wrong standard in denying appellant's request to relieve retained counsel*

Appellant contends the trial court's ruling is not entitled to deference on appeal because the court applied the wrong standard in conducting a *Marsden* hearing and requiring appellant to show inadequate representation by counsel or a total breakdown in the attorney-client relationship. We disagree.

Contrary to appellant's assertion, it appears clearly on the record that the trial court denied appellant's request to discharge counsel because the request was not timely and the continuances that would be necessary to enable new counsel to prepare would cause a lengthy delay in a very old case, thus disrupting " ' "the orderly processes of justice." ' " (*Maciel*, *supra*, 57 Cal.4th at pp. 512–513.) The court did not err by giving appellant an opportunity to air his complaints against his retained attorney, nor did it erroneously deny the discharge request merely because appellant had failed to demonstrate that counsel was incompetent or that there was an irreconcilable conflict between appellant and his attorney. "In evaluating whether a motion to discharge retained counsel is 'timely, i.e., if it will result in

"disruption of the orderly processes of justice" ' [citation], the trial court considers the totality of the circumstances [citations]. Although a defendant seeking to discharge his retained attorney is not *required* to demonstrate inadequate representation or an irreconcilable conflict, this does not mean that the trial court cannot properly consider the absence of such circumstances in deciding whether discharging counsel would result in disruption of the orderly processes of justice." (*Id*. at p. 513.)

Here, the trial court plainly found appellant's request to discharge his retained counsel to be untimely and did nothing improper in giving appellant an opportunity to convince the court in a closed *Marsden*-type hearing to grant the request anyway.

II. The Trial Court Did Not Deny Appellant His Right to Plead Not Guilty by Reason of Insanity

Appellant contends the trial court violated his rights under state law and his federal constitutional right to due process by denying appellant's requests "on numerous occasions" to change his plea to not guilty by reason of insanity (NGI). Appellant's claim lacks merit because the record in this case shows no request by appellant to enter a plea of NGI or any denial of appellant's right to change his plea by the trial court.

A. *Applicable law*

Every plea, including a plea of NGI, "shall be entered or withdrawn by the defendant himself or herself in open court." (§ 1018; *People v. Clark* (2011) 52 Cal.4th 856, 963.) Our Supreme Court "has recognized that the decision to enter or withdraw a plea of NGI is one for the defendant, not counsel, to make even if doing so may be tactically unwise." (*Clark*, at p. 963.) Courts have held that a " 'trial judge's ruling denying defendant's application for permission to file an additional plea of

not guilty by reason of insanity will not be disturbed on appeal, except upon a showing of abuse of discretion by the trial judge.' " (*People v. Natale* (1962) 199 Cal.App.2d 153, 157, quoting *People v. Young* (1938) 26 Cal.App.2d 700, 702; see *People v. Doolittle* (1972) 23 Cal.App.3d 14, 18.) However, a trial court has no discretion to deny a defendant's motion to enter an insanity plea "solely because his counsel oppose[s] that choice on tactical grounds." (*People v. Medina* (1990) 51 Cal.3d 870, 900; *People v. Henning* (2009) 178 Cal.App.4th 388, 397 [trial court's refusal to allow defendant to enter NGI plea over objection of defense counsel violated statutory right to personally enter plea of choice under § 1018].) Further, "neither the court nor counsel may override a defendant's decision to plead NGI when such a decision is made freely and voluntarily and with knowledge of the consequences." (*Clark*, *supra*, at p. 963; *People v. Gauze* (1975) 15 Cal.3d 709, 717–718.)

B. *Appellant has failed to carry his burden of affirmatively showing error by the trial court*

It is the burden of a defendant challenging his conviction to affirmatively show error in the proceedings below. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Thus, "[o]n appeal, we presume that a judgment or order of the trial court is correct, [and] ' "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent." ' " (*People v. Giordano* (2007) 42 Cal.4th 644, 666, quoting *Denham*, at p. 564.) Here, appellant's claim that the trial court refused to allow him to plead NGI is belied by the record, which also shows that neither appellant nor defense counsel ever expressly asked to enter an NGI plea.

At the hearing on appellant's request to discharge retained counsel, appellant told the court he felt he had an insanity defense, but his attorney was "never prepared." Pensanti responded, "As to the sanity plea, I have brought up the insanity numerous occasions. I have tried to get a neurologist to see [Mr. Renteria] so that we could have a basis for the insanity plea." The court expressed skepticism about an NGI plea because one expert had already concluded there was no basis for insanity findings. Nevertheless, the court observed, "There's still time between now and the time of trial, two weeks from now, that you can get your doctor in, show good faith that he is going to provide a [basis] for an N.G.I. plea." Significantly, neither appellant nor defense counsel made any request to change the plea or enter an NGI plea at that time.

The trial court did state that it had previously not allowed appellant "to enter an N.G.I. plea without some legal foundation for it." But no ruling denying or even addressing a request to change the plea to NGI appears anywhere in the record.

The matter of an insanity plea came up again just before trial when Dr. Shaheen Lakhan, the neurologist retained by the defense, completed his examination of appellant. After Dr. Lakhan had given an oral report of his findings to the court, the trial judge asked, "So [the defendant is] not attempting to change his plea at this time?" Defense counsel answered that he was not, and appellant remained silent.

Because it appears that the trial court had no occasion to rule on any request to enter a plea of NGI, we conclude that appellant has failed to carry his burden of affirmatively showing error by the trial court in connection with the entry or change of appellant's plea.

III. Prosecutorial Misconduct

Appellant contends that the trial court erred by allowing the prosecutor to play portions of a surveillance video during closing argument that had not been shown to any witness during the evidentiary portion of the trial. Although the entire video was admitted into evidence pursuant to stipulation, appellant contends the district attorney committed prosecutorial misconduct by showing portions of the video to the jury that were not covered by the stipulation. We find no error on the part of the trial court nor misconduct by the prosecutor in playing for the jury portions of a video that had been admitted into evidence in its entirety without objection.

A. *Factual background*

During trial the prosecution introduced as exhibit 2 a surveillance video from the Target department store. The prosecutor then played several segments of the video showing the street view outside the store as Detective Nuttall identified and described what was happening in those portions. Later the entire video was admitted into evidence without objection. The defense also stipulated: "People's exhibit 2 contains video taken on July 22nd, 2014 from the Target store security surveillance system at 5711 Sepulveda Boulevard, Van Nuys, California 91411. The video accurately depicts the occurrences at the location as detailed on the time stamp."

In his opening argument the prosecutor played a different segment of the video showing Vasquez and coworkers running up and down the parking structure stairwell. There was no objection from the defense.

During a break following the prosecutor's argument, defense counsel advised the court she wanted to put something

on the record and pointed out that the prosecutor had played a portion of the video during argument about which no witness had testified. Counsel admitted that she had seen the entire video and did not question the authenticity of the stairwell segment. But she explained that she had believed her stipulation about the accuracy of the video would apply only to the portions of the video shown to the jury during the evidentiary phase of trial. She added, "I just want to make a record that my possibly stupid assumption that the video that I stipulated to had the actual things at trial isn't the case."

The trial court found no prejudice had resulted from showing the additional portions of the video during argument, reasoning that the entire video had been admitted into evidence and the defense had stipulated to the video's accuracy. The court also noted that the video was consistent with Vasquez's testimony about his use of the stairwell and there was no dispute over the accuracy of the depiction of him going up and down the stairs.

Appellant again raised the issue in his motion for a new trial, casting it for the first time as prosecutorial misconduct. At the hearing on the motion, the court indicated that the issue was likely forfeited by defense counsel's failure to make a timely objection. The court went on to find no prejudice, even if the prosecutor were deemed to have committed misconduct.

B. *Appellant forfeited any claim of prosecutorial misconduct*

Defense counsel did not object to the prosecutor's use of the video during argument, nor did she object during the break, but sought merely to explain that she made a "possibly stupid assumption" regarding her stipulation to the video. " 'As a

general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Winbush* (2017) 2 Cal.5th 402, 481, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Defense counsel's remarks during the break after the prosecutor's use of the video were untimely and insufficient to preserve any sort of misconduct claim. In making her record, counsel did not clearly assert misconduct on the part of the prosecutor, nor did she request an admonition that the jury disregard those portions of the video that had not been shown during the evidentiary phase of the trial. Appellant forfeited any claim of prosecutorial misconduct by failing to raise the issue in a timely manner in the trial court; by the time appellant brought his motion for a new trial, that ship had already sailed.

IV. The Trial Court Had No Duty to Instruct the Jury on Involuntary Manslaughter Based on Unconsciousness Due to Voluntary Intoxication

Appellant contends the trial court had a sua sponte duty to instruct the jury on involuntary manslaughter as a lesser included offense of murder and the failure to do so was prejudicial, requiring reversal. Specifically, appellant maintains the court was required to give CALCRIM No. 626, which states that an unlawful killing constitutes involuntary manslaughter if the defendant was unconscious as a result of voluntary

intoxication.[6] (§ 29.4.) Because we find no substantial evidence that appellant was unconscious as a result of voluntary intoxication when he killed Miguel, we conclude the trial court had no duty to instruct on this theory of homicide.

The unlawful killing of a human being without malice is involuntary manslaughter, a lesser included offense of murder. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 414.) Voluntary intoxication that renders the defendant unconscious can prevent formation of the specific intent required for murder and thus reduce a criminal homicide to involuntary manslaughter. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1227.) "Unconsciousness does not mean that the actor lies still and unresponsive. Instead, a person is deemed 'unconscious' if he or she committed the act without being conscious thereof." (*People v. Haley* (2004) 34 Cal.4th 283, 313.) Thus, " '[w]hen a person renders himself or

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[6] CALCRIM No. 626 instructs that "[a] very intoxicated person may still be capable of physical movement but may not be aware of his or her actions or the nature of those actions." Voluntary intoxication may reduce a murder to involuntary manslaughter if the jury finds beyond a reasonable doubt that:

"1. The defendant killed without legal justification or excuse;

"2. The defendant did not act with the intent to kill;

"3. The defendant did not act with a conscious disregard for human life;

"AND

"4. As a result of voluntary intoxication, the defendant was not conscious of [his] actions or the nature of those actions."

herself unconscious through voluntary intoxication and kills in that state, the killing is attributed to his or her negligence in self-intoxicating to that point, and is treated as involuntary manslaughter.' " (*Rangel*, at p. 1227, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 423.)

It is settled that in a criminal case, even absent a request, "a trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury." (*People v. Booker* (2011) 51 Cal.4th 141, 181 (*Booker*); *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).)

However, the sua sponte duty to instruct on a lesser included offense arises only if "there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense. [Citation.] Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed." (*People v. Simon* (2016) 1 Cal.5th 98, 132; *People v. Manriquez* (2005) 37 Cal.4th 547, 587–588; *Breverman*, *supra*, 19 Cal.4th at p. 162.) "Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense" (*Simon*, *supra*, at p. 132), and "[w]hen there is no evidence the offense committed was less than that charged, the trial court is not required to instruct on the lesser included offense" (*Booker*, *supra*, 51 Cal.4th at p. 181; *People v. Moye* (2009) 47 Cal.4th 537, 548).

We apply a de novo standard of review to the question of whether the trial court erred in failing to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1215.)

Appellant maintains that his "entire case hinged on the issue of voluntary intoxication." But we find the evidence on which appellant relies to fall far short of any substantial evidence that appellant was unconscious due to voluntary intoxication when he killed Miguel.

According to appellant, Dr. Markman's testimony provided the requisite evidentiary support for an unconsciousness instruction. It did not. Dr. Markman testified that appellant had a long history of drug and alcohol abuse, he used crystal methamphetamine on a daily basis, and he was "under the influence" when he was evaluated at the hospital for possible heart failure. But Dr. Markman did not specify a time frame during which he believed appellant was "under the influence" nor did he correlate appellant's conduct in shooting and then stabbing the victim with his methamphetamine use or the degree to which appellant was under the influence of the drug. Rather, in response to a comment by defense counsel—"So I think you did say something about an overdose in your report that you —" Dr. Markman testified in generalities: "Oh, well, he had — he was using crystal meth and was using it on a regular basis and was under the influence. [¶] And crystal meth is a stimulant and it does a lot of things that can produce even symptoms that mimic a psychosis or a craziness. [¶] You can hear voices. You can become very paranoid and concerned about the people around you, even the family around you, that are there to harm you. So it produces that kind of a thought process." Dr. Markman added that methamphetamine causes a person to be aggressive and to

"act in a very rapid, thoughtless manner," "without consideration of the consequences or . . . alternatives."

Glaringly absent from Dr. Markman's testimony is the slightest intimation that appellant was actually so impaired as to be unconscious of his actions or the effect of those actions when he took Miguel's life.

Appellant further claims that "[t]he details of the crime alone add to the evidence of unconsciousness." In support of this assertion appellant cites Officer Charles's testimony that, at the time of his arrest, appellant was very aggressive, "sweating a lot," and "wasn't saying anything," it took five officers to take appellant down, and afterwards the fire department transported appellant to the hospital. None of this evidence even remotely suggests appellant was unconscious, particularly when stacked up against the evidence that appellant acted consciously with purpose and resolve over a period of time in attacking and killing his victim.

In short, nothing in the evidence presented at the trial of this case even hints that appellant was so grossly impaired as to be considered "unconscious," and therefore no substantial evidence supported a sua sponte duty to instruct with CALCRIM No. 626.

V. There Was No Cumulative Error

Appellant contends the aggregate prejudicial effect of the trial court's errors in this case requires reversal. Having rejected all of appellant's assignments of error, we find no cumulative error. (See *People v. Vieira* (2005) 35 Cal.4th 264, 294 ["Because we find no valid claim of error on appeal, we reject defendant's contention that his guilt phase judgment must be reversed for cumulative error"].)

VI. Remand

A. *Remand is appropriate to allow the trial court to exercise its discretion under section 12022.53, subdivision (h) as amended by Senate Bill No. 620*

Appellant and respondent agree, and we concur that the case should be remanded to afford the trial court an opportunity to exercise its discretion to impose or strike the firearm enhancement under section 12022.53, subdivision (h) as amended by Senate Bill No. 620.

Appellant's sentence includes what was, at the time of appellant's sentencing, a mandatory consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 708.) Senate Bill No. 620, which became effective January 1, 2018, amended section 12022.53, subdivision (h) to remove the prohibition on striking a firearm enhancement, and allows the court, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section." (Stats. 2017, ch. 682, § 2; *Chavez*, *supra*, at p. 708.)

The parties agree that the amendment to section 12022.53, subdivision (h) applies retroactively to nonfinal judgments under *In re Estrada* (1965) 63 Cal.2d 740, 745, and *People v. Francis* (1969) 71 Cal.2d 66, 76–77. And because the judgment of conviction in appellant's case was not final when Senate Bill No. 620 took effect, appellant is entitled to the benefits of the amendments to section 12022.53.

Accordingly, we remand the matter to the trial court for consideration of whether to strike the firearm enhancement

pursuant to the discretion now conferred under section 12022.53, subdivision (h).

B. *On remand appellant is entitled to a "*Franklin *proceeding*"

Appellant contends his case must be remanded to the trial court to afford him the opportunity to make a record of youth-related mitigating evidence relevant to his eventual youth offender parole hearing. Respondent concedes the point, and we agree with the parties that a limited remand is required.

Section 3051, subdivision (b)(3) currently provides that "A person who was convicted of a controlling offense that was committed when the person was 25 years of age or younger and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the [Board of Parole Hearings] during his or her 25th year of incarceration at a youth offender parole hearing."[7] Section 4801, subdivision (c) in turn directs that the Board of Parole Hearings, "in reviewing a prisoner's suitability for parole . . . shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark

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[7] As originally enacted in 2013, only prisoners 18 years of age or younger at the time of their controlling offense qualified for a youth offender parole hearing. (Stats. 2013, ch. 312, § 4.) The statute was amended in 2015 to apply to persons who were 23 or younger at the time of their controlling offense. (Stats. 2015, ch. 471, § 1.) And pursuant to amendments effective January 1, 2018, persons who were 25 or younger when they committed their qualifying offense are now eligible for a youth offender parole hearing under section 3051. (Stats. 2017, ch. 684, § 1.5.)

features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law."

In *Franklin*, *supra*, 63 Cal.4th 261, the California Supreme Court upheld a juvenile offender's two consecutive 25-year-to-life sentences, but "remand[ed] the matter to the trial court for a determination of whether [he] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Franklin*, at p. 284; *People v. Rodriguez* (2018) 4 Cal.5th 1123, 1131 (*Rodriguez*).) The high court stated that if the trial court determined there had not been a sufficient opportunity to make such a record, it may receive submissions and evidence as contemplated under sections 3051, subdivision (f) and 4801, subdivision (c).[8] (*Franklin*, at p. 284.) Thus, " '[t]he defendant may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors.' " (*Cook*, *supra*, 7 Cal.5th at p. 450; *Franklin*, at p. 284.)

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[8] In subsequent decisions, the high court did away with the intermediate step of having the trial court determine whether there had been a sufficient opportunity to make a record under existing sentencing procedures, extending the benefit of *Franklin*'s evidence preservation proceeding to any juvenile offender who will qualify for a youth offender parole hearing under section 3051. (*Rodriguez*, *supra*, 4 Cal.5th at pp. 1131–1132; *In re Cook* (2019) 7 Cal.5th 439, 449, 458 (*Cook*).)

As *Franklin* explained, "[t]he goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' " (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

Appellant was 24 years old when he committed the offense in this case, and he was sentenced to an indeterminate term of 25 years to life for first degree murder, plus a consecutive term of 25 years to life for the firearm enhancement. He was sentenced on June 8, 2017, after *Franklin* and *Rodriguez* were decided but before section 3051 was amended to make the *Franklin* proceeding relevant to him. Because appellant qualifies for a youth offender parole hearing during the 25th year of his incarceration, he is entitled to a limited remand for the purpose of giving appellant and the People an opportunity to supplement the record with information relevant to appellant's eventual youth offender parole hearing. (*Rodriguez*, *supra*, 4 Cal.5th at p. 1132; *Franklin*, *supra*, 63 Cal.4th at p. 277; *Cook*, *supra*, 7 Cal.5th at p. 449.)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded to allow the trial court to exercise its discretion to impose or strike the firearm enhancement under Penal Code section 12022.53, subdivision (h). On remand appellant shall also be afforded an opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory duties in accordance with Penal Code sections 3051 and 4801.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.